

**FAIR EMPLOYMENT & HOUSING COMMISSION**

455 GOLDEN GATE AVENUE, SUITE 10600  
SAN FRANCISCO, CA 94102  
(415) 557-2325 FACSIMILE (415) 557-0855  
[www.fehc.ca.gov](http://www.fehc.ca.gov)



## MINUTES 485th COMMISSION MEETING

October 19, 2010

Primary Location:  
Hiram Johnson State Building  
455 Golden Gate Avenue, Monterey Room  
San Francisco, California

Additional Telephonic Location:  
Carlton, DiSante & Freudenberger  
4510 Executive Drive, Suite 300  
San Diego, California

***PRESENT:***

Chairman George Woolverton, Vice-Chair Patricia Perez; Commissioners Dave Carothers (by telephone from San Diego), and Stuart Leviton; Commission staff Ann Noel, Joan Herrington, Caroline Hunt and Cynthia Jones and Commission Law Student Extern Rebecca Bishaf; Department of Fair Employment and Housing Director Phyllis Cheng; and members of the public: Sondra Solovay, Esq.; Beth Kenny, Esq.; Noah Lebowitz, Esq., California Employment Lawyers' Association; and Susan Skamser, ADA Coordinator, Contra Costa County.

### ***OPEN SESSION***

Chairman George Woolverton moved, Commissioner Leviton seconded, and the Commission voted 4:0 to open the meeting at 10:06 a.m. [10-31]

### **REVIEW OF AGENDA**

Chairman Woolverton moved, Commissioner Leviton seconded, and the Commission voted 4:0 to accept the Agenda as submitted. [10-32]

### **REVIEW OF THE MINUTES**

Chairman Woolverton moved, Commissioner Leviton seconded, and the Commission unanimously voted to adopt the Minutes and Transactions of the 484th Commission meeting. [10-33]

### **REGULATIONS (10:21 a.m.)**

ELAS Noel reported on the current status of the Commission's regulatory projects in the areas of pregnancy, disability and housing. Commissioners are working with staff on each regulatory project.

**Pregnancy Regulations:** The Commission discussed the new revised draft of pregnancy regulations, modified by the Commission's Pregnancy Regulations Subcommittee, Vice Chair Patti Perez and Commissioner Stuart Leviton, after reviewing all public comments received from its August 24, 2010 regulations.

ELAS Noel stated that the pregnancy subcommittee wanted to bring to the full Commission the following four items.

**1. "Perceived Pregnancy"** Noel stated that the subcommittee had separated out provisions of the regulations where "perceived" pregnancy would be covered – all the provisions covered by sex discrimination under Government Code section 12940, and those provisions where it would not be covered, Government Code section 12945, covering reasonable accommodation, transfer and pregnancy disability leave. Noel told the Commission that she had written a memorandum on "perceived pregnancy" which she sent to State and Consumer Services Agency Bill Leonard describing these changes. Chairman Woolverton requested that staff send a copy of the memorandum to the Commissioners.

**2. "Involuntary Transfers, " § 7291.6(a)(1)(I).** ELAS Noel stated that the subcommittee had tried to strike a balance between comments received from representatives of employers and employees on this issue. Noah Lebowitz, CELA representative, questioned the Commission's authority to add language about undue risk and suggested deleting all language after "against her wishes." Susan Skamser, speaking as a representative of employers, has liability problems with keeping an employee, such as a nurse who has to lift patients, in positions where there are lifting restrictions, such as 20 pounds, and who nonetheless does not want to be transferred.

**3. "Undue hardship" defense for reasonable accommodations, § 7291.7(a)(2).** Noah Lebowitz stated that CELA was joined by the public interest sector, ERA and ELC, in their comments rejecting the inclusion of this defense. Lebowitz believes that there is no statutory authority for this defense, only the Legislature has this authority. Lebowitz does not understand the tinkering that's been done to this section. He is confused because the earlier version makes clear that it is an affirmative defense.

Commissioner Leviton pointed out that the language is now confusing and a phrase was taken out that should have been left in. Language should read: § 7291.7(a)(2): "The employer has not demonstrated that the reasonable accommodation would produce an "undue hardship," as defined at Government Code section 12926, subdivision (s)." Leviton suggests placing this language back in this section. Chairman Woolverton moved, Commissioner Leviton seconded, and the Commission voted 4:0 to make this modification. [10-34]

DFEH Director Phyllis Cheng stated that DFEH had previously testified that undue hardship should not be included. DFEH does not interpret this section to include undue hardship. Cheng noted that FEHA should be liberally construed to provide more rights rather than fewer rights. If there's going to be a lot of controversy, is it worth another meeting to consider this? Perhaps the

Commission should “go back to the drawing board.”

Chairman Woolverton stated, the Commission has to get this right. Commissioner Leviton asked, if we do not import undue hardship, what is the alternative definition of “reasonableness” for reasonable accommodation? Leviton stated that what he is hearing from the employee representatives is that anything a pregnant employee requests is reasonable. If that is the case, then the Commission is coming up with an entirely different definition not supported by the statute.

Chairman Woolverton suggested that the Department, CELA and any other commentators who do not like this regulation suggest alternatives.

Commissioner Leviton stated that he is not in favor of putting this over and is convinced that undue hardship makes sense. Vice Chair Perez is also not persuaded that any other definition of reasonable accommodation makes sense. Perez has not heard any reasonable alternative solutions. In contrast, with involuntary transfer, thinks alternative language could be very useful:

**4. Employer Notification of Available, Comparable Position, § 7291.10(c)(2)(A):**

ELAS Noel reported that employer comments requested a 10 day period of notification but the subcommittee still recommends 60 days. Noah Lebowitz commented that CELA still does not understand the undue hardship language in this section, why would there ever be undue hardship to notify an employee of a comparable job.? An employer just needs to show that it has made reasonable efforts to notify an employee of comparable jobs. Lebowitz thinks there could be wordsmithing that could be done, and will provide alternative language to the Commission. Noel stated that maybe undue hardship is not needed here. Commissioner Leviton thinks that it is unlikely that employer could prove undue hardship.

Chairman Woolverton: It behooves the FEHC to come up with other language for these four sections and consider alternatives.

Commissioner Carothers asked the subcommittee why they had 60 days here rather than 10 days. Commissioner Leviton explained that the Commission had extended the period to 60 days at employees’ request from 10 days because it is easy for employers to hide jobs for 10 days. And, how would employees know that position exists? Leviton stated that the subcommittee tried to provide a process for employees to know about alternate jobs and tried to balance both sides’ position.

Chairman Woolverton, moved to adopt these regulations with the one modification noted above adding deleted language back to section 7291.7(a)(2) [10-34 above], for further comment for another 15-day public comment period, and then have the subcommittee consider further amendments. Chairman Woolverton moved, Vice Chair Patti Perez seconded, and the Commission adopted this motion 4:0: to adopt the current set of the regulations with the one modification noted above and send out for public comment. [10-35]

### **Disability Regulations**

ELAS Noel reported that FEHC extern Mark Rodiles-Peterson is working with staff to do a preliminary economic analysis of the Commission's revised disability regulations. Staff will then work with a financial analyst with the Franchise Tax Board to prepare a fiscal impact statement for the Department of Finance.

Noel stated that staff will turn its full attention to the disability regulations once it completes the pregnancy regulations.

Noel welcomed two members of the public, Sondra Sollovay, Esq. and Beth Kenny, Esq., both of whom wanted to address the Commission about FEHC's draft disability regulations. Noel noted that the Commission has not begun rulemaking or the public comment period yet but nonetheless welcomed both Sollovay and Kenny to address the Commission.

Sollovay talked with the Commission about the exclusion of obesity as a disability except where there is a physiological basis in the about obesity section of the draft disability regulations (proposed draft disability regulations at Cal. Code Regs., tit. 2, § 7293.6(d)(9)(c)). Obese people face many types of employment discrimination. Sollovay talked about the death of a girl, "Christina," who had a very high weight by the time she was in middle school. Her school was at a top of a high hill with no accessible entrance. The school would not accommodate her because they told her that obesity was not a disability. Her mother then home schooled her and she died shortly thereafter.

Sollovay noted that rates of obesity are not proportional across racial and ethnic groups and thus obesity provides another excuse for discrimination. Sollovay stated that she is here to offer educational assistance in any manner that she can.

Chairman Woolverton asked Sollovay to send any information that she thinks would find helpful to the Commission. ELAS Noel asked Sollovay to address how the Commission could ignore *Cassista v. Community Foods, Inc.*, the California Supreme Court decision upon which the obesity exclusion is based. Commissioner Leviton stated that we are trying to write a regulation that accurately reflects the law.

Sollovay stated that she wrote a brief supporting the EEOC's position in *E.E.O.C. v. Watkins Motor* (6th Cir.) alleging that obesity is a disability. Chairman Woolverton asked Sollovay also to send the brief to the Commission. Vice Chair Perez assured Sollovay and Kenny that this was an issue that was discussed by the disability regulations subcommittee and the regulation reflects the California Supreme Court's decision in *Cassista v. Community Foods, Inc.*

### **Housing Regulations**

ELAS Noel reported that work on the housing regulations is delayed because of staff resources and will resume once we have completed work on the Commission's other regulations.

### **Procedural Regulations**

Commissioner Leviton proposed bifurcating meetings to discuss civil rights topics for part of the meeting and do the closed session of the meeting telephonically. Chairman Woolverton opposes telephonic meetings. Woolverton stated that we can have longer meetings, if needed.

Commissioner Leviton welcomed public comments at Commission meetings. If we can do something at a monthly basis, like getting decisions moved along at telephonic meetings, this would be efficient. We need to do more public outreach and education.

Chairman Woolverton stated that we are not doing more public outreach and education because of resources. Commissioner Leviton stated if we do closed sessions by telephone, we could do this very efficiently and without expense. This then frees up resources and time for a full meeting involving the public.

Chairman Woolverton says that we need to be flexible about our meetings. Vice Chair Perez said meeting three hours every three months is not enough time. We need to meet more often. Vice Chair Perez would like to meet every month, even if Commissioners pay for their own travel.

Commissioner Leviton suggests that the Chairman work with the Executive Officer on how to structure meetings to accomplish more. Chairman Woolverton would like to discuss this at the next Commission meeting and directs staff to put this on the agenda.

Vice Chair Perez stated that she has spoken a couple of times about the draft disability regulations at the DFEH-sponsored employer roundtables. Perez stated that she has been incredibly impressed with the respect of the questions and comments that the Commissioners have received from the public about the disability regulations.

The Commission took a break at 11:34 a.m.

### **DEPARTMENT'S REPORT (11:50 a.m.)**

DFEH Director Phyllis Cheng presented the report for the DFEH.

- The Governor signed the DFEH sponsored FEHA "clean up" bill, SB 1252 (Corbett), which makes technical amendments to the FEHA.
- The DFEH's procedural regulations are in the process of being revised and should be posted at the end of October or early November for further public comment. Commissioner Leviton asked if there were very many changes. Director Cheng said no, there were not. Leviton and FEHC ALJ Hunt expressed surprise at this because there were many comments about numerous aspects of these regulations.

- Enforcement division has exceeded the number of cases EEOC dual-filed: 4,468 cases and have met the HUD contract also.
- The DFEH settled a class action involving allegations of pregnancy, disability, and CFRA leave affecting 1,500 employees.
- The mediation division doing very well with over 100 mediations.
- The DFEH hosted three employer roundtables partnering with the Commission to discuss disability regulations: in Oakland, Fresno and Los Angeles.
- DFEH has launched its first webinar on leave internally, DFEH then will open it up to others. DFEH is using "Go To Meeting" for its webinars.
- DFEH has submitted its 2009 annual report, online. Commission has not received this yet.
- Chief Counsel Susan Saylor has submitted a report about enforcement of the Commission's decisions. The Commission thanked the DFEH for that report.
- DFEH has closed its San Diego and Santa Ana offices. DFEH gave \$1 million back to the state's General Fund. When Cheng started, DFEH had 11 offices; it will soon have only 6.
- DFEH has hired 7 legal analysts in its enforcement division. DFEH is now hiring attorneys for these positions.
- The DFEH has started an internship program for law graduates awaiting bar results. The budget crisis has been a way for the DFEH to innovate.

Vice Chair Patti Perez asked Director Cheng about starting a roundtable in San Diego. Cheng and Commissioner Carothers agreed to work on this project with the San Diego County Bar Association.

Vice Chair Perez asked Director Cheng for more details about its mediation project. Cheng reported that anyone can request mediation. Most of the time, the DFEH has not even made a "cause finding" before the mediation. The mediation unit is settling a lot of cases. Cheng thinks this unit will do as much as the legal division in resolving cases. The DFEH is trying not to lose accusations and would like to do more to keep people in the administrative process.

ALJ Hunt asked Cheng if mediation could meet the FEHA mandate for the DFEH to engage in conciliation with the respondent. Cheng stated that the DFEH is trying to get mediation to count.

Commissioner Leviton asked if the DFEH is doing anything to address bullying of students. Cheng stated that it would be great to make a video on this subject. Judge Hunt stated that she's had a good discussion on ideas about this issue with DFEH's Annmarie Billotti.

Cheng stated that the DFEH has created a legacy video. ELAS Noel stated that anyway that we can contribute on a video on bullying, we would be happy to do so. Cheng stated that the DFEH has posted its other videos on Facebook and YouTube.

**EXECUTIVE AND LEGAL AFFAIRS SECRETARY'S (ELAS) ACTIVITY REPORT**  
**(12:09 p.m.)**

ELAS Noel reported on the following items:

- 1. Minority Business Training in Sacramento:** ELAS Noel stated that she would defer a report on the progress of a minority business conference in Sacramento for the next meeting when Commissioner Linda Ng will attend.
- 2. Housing Practice Guide:** The Commission and DFEH are awaiting word from The Rutter Guide on whether it will publish our Fair Housing/Public Accommodations practice guide. TRG remains enthusiastic about the project but needs approval from its parent company, Thomson Reuters, and obtaining approval has taken awhile.
- 3. Ethics Training:** ELAS Noel stated that she would refer all Commissioners to the Commission's ethics officer, Judge Hunt, for a discussion of their compliance with required ethics training. Judge Hunt asked the Commissioners to please complete their ethics training by the end of the year.
- 4. Green Meetings:** ELAS Noel asked the Commissioners for feedback on receiving mailout items electronically rather than a paper version. Commission Clerk of the Commission Cynthia Jones stated that it made mailout significantly easier for her. All Commissioners stated that they are fine with an electronic mailout, especially if it eases the burden on staff.
- 5. Miscellaneous:** ELAS Noel directed the Commissioners' attention to her Activity Report for other items.

**PRECEDENTIAL DECISIONS** (12:20 p.m.)

FEHC Extern Rebecca Bishaf presented a report to the Commission about when it designates decisions to be "precedential," under California Code of Regulations, title 2, section 7435, subdivision (a). Bishaf stated that this regulation requires that a decision must contain a significant legal or policy determination of general application that is likely to recur before it is designated as precedential. She noted that the Commission has sometimes stated specifically why it has made a decision precedential while at other times, it has simply designated the decision as precedential without giving a reason.

The Commissioners thanked Bishaf for her report and complimented her on her research and writing.

**ATTORNEY GENERAL'S REPORT (12:29 p.m.)**

Deputy Attorney General Kathy Mikkelsen gave the Attorney General's report. Mikkelsen reported that Tony Seferian is working on the reply brief for the Commission in *Terra Linda Farms v. Fair Empl. & Hous. Com.*

**PUBLIC COMMENTS (12:30 a.m.)**

There were no further public comments.

Chairman Woolverton moved, Commissioner Leviton seconded, and the Commission voted unanimously 4:0 to end Open Session and to enter Closed Session. [10-36]

The Commission entered Closed Session at 12:31 p.m.

**CLOSED SESSION (12:31 p.m.)**

Only the Commissioners and Commission staff were present.

The Commission discussed writs, hearings and litigation and deliberated on pending cases.

**Administrative Adjudication: Pending Decisions, Hearings Completed**

(1) DFEH v. Lyddan Law Group (Williams)

Chairman Woolverton moved, Commissioner Leviton seconded, and the Commission voted 4:0 to adopt the final decision. [10-37] Chairman Woolverton moved, Vice Chair Patti Perez seconded, and the Commission voted 4:0 to make the decision precedential. [10-38]

Judge Caroline Hunt left the room.

(2) DFEH v. Avis Budget Group (Reed)

Chairman Woolverton moved, Commissioner Leviton seconded, and the Commission voted 4:0 to adopt the final decision. [10-39] Commissioner Leviton moved, Chairman Woolverton seconded, and the Commission voted 4:0 to make the decision precedential. [10-40]

(3) DFEH v. Goldstar Van Lines (Robbins)

Commissioner Leviton moved, Vice Chair Patti Perez seconded, and the Commission moved 4:0 to adopt the Proposed Decision. [10-41]

Judge Caroline L. Hunt reentered the room.



**ADJOURNMENT**

Chairman George Woolverton moved, Vice Chair Patti Perez seconded, and the Commission voted 4:0 to adjourn the meeting. [10-30]

The Commission adjourned its meeting at 12:53 p.m.

Date: October 19, 2010

GEORGE WOOLVERTON

Chairman

ANN M. NOEL

Executive and Legal Affairs Secretary

**REPORT OF TRANSACTIONS  
OF THE 485th COMMISSION MEETING**

**October 19, 2010  
San Francisco, California**

THE COMMISSION AT THIS MEETING TOOK THE FOLLOWING ACTIONS:

- 10-31 Voted 4:0 to call the meeting to order.
- 10-32 Voted 4:0 to approve the Agenda.
- 10-33 Voted 4:0 to adopt the Minutes and Transactions of the 484th Commission meeting.
- 10-34 Voted 4:0 to amend the proposed, revised pregnancy regulations in § 7291.7(a)(2) as follows: “The employer has not demonstrated that the reasonable accommodation would produce an “undue hardship,” as defined at Government Code section 12926, subdivision (s).”
- 10-35 Voted 4:0 to adopt the proposed, revised pregnancy regulations as submitted with the one change noted at 10-34 and send these regulations out for an additional 15 day written comment period.
- 10-36 Voted 4:0 to end Open Session and begin Closed Session.
- 10-37 Voted 4:0 to adopt the final decision in DFEH v. Lyddan Law Group, LLC (Williams)
- 10-38 Voted 4:0 to make its decision in DFEH v. Lyddan Law Group, LLC (Williams) precedential.
- 10-39 Voted 4:0 to adopt the final decision in DFEH v. Avis Budget Group (Reed).
- 10-40 Voted 4:0 to make its decision in DFEH v. Avis Budget Group (Reed) precedential.
- 10-41 Voted 4:0 to adopt the Proposed Decision in DFEH v. Goldstar Van Lines (Robbins).
- 10-42 Voted 4:0 to adjourn the meeting.

Prepared By

Ann M. Noel  
Executive and Legal Affairs Secretary